THE WORKING OF THE NEW JERSEY SHORT PRACTICE ACT

By Martin Conboy.

There are two Short Practice Acts in New Jersey, one for courts of law, the other for the court of chancery. The former became a law on March 28, 1912, and consisted at the time of its adoption of 34 sections and 83 rules. Since then the number of rules has been increased to 180, but all except 13 of the additional 97 were in force before the practice act was adopted. The latter became a law on March 30, 1915, and consists of 13 sections and 65 rules. It is with the working of the former that this paper deals.

"The wall of separation between legal and equitable relief" is still maintained in New Jersey. The Supreme and Circuit Courts administer what we call law as distinguished from equity and the court of chancery grants equitable relief. The separation is maintained not only by a difference in courts, but also by a difference in judges. The law courts are presided over by justices of the Supreme Court and the circuit court judges. The jurisdiction of the Supreme and Circuits Courts, so far as ordinary law actions are concerned, is identical. The chancellor signs all decrees in chancery and the work of the court of chancery is conducted by the chancellor and the vice chancellors. There is, therefore, a complete separation between legal and equitable relief as regards procedure, courts and judges. The court of errors and appeals constitutes an exception to this extent: All appeals, whether from judgments at law or decrees in chancery, go to that court. The chancellor presides except when the appeal is from the Court of Chancery and then he does not sit and the presiding officer is the chief justice of the Supreme Court. The court is constituted of the chancellor, the chief justice and justices of the Supreme Court and six judges "specially appointed."

I have at the outset referred to the maintenance of the separation between legal and equitable relief in New Jersey, because I consider it of importance in this respect, *viz.*: it obviates the difficulty that code states labor under in attempting to make one set of rules for courts administering two kinds of remedies.

One other feature in New Jersey having a bearing upon the working of the Short Practice Act is the nature of the judicial tenure. Judges in New Jersey are appointed and not elected. While the term of office is fixed at seven years, the experience is that good judges are almost invariably reappointed. Politics cut very little figure once the judge has gotten on the bench. I do not mean to imply that it plays the most important part in the original selection, but, as is natural, Democratic governors usually find competent judicial material in the ranks of the Democratic party and Republican governors in the ranks of the Republican party. There can be no gainsaying the fact that the judiciary is on a high plane.

These preliminary observations are of importance, because the most striking feature of the New Jersey Practice Act is the wide discretion that is left to the judiciary, which is given the power of governing the whole field of practice by means of rules. This tends to greater elasticity than is possible when direct legislation must be invoked for every alteration which experience shows to be desirable. That this discretion is wisely exercised the general satisfaction among practitioners seems amply to demonstrate. It is true that the power itself, if abused, would result in a changeable procedure, which it has been rightly said "is a grievous burden to the community, which must pay the price of interpreting all new regulations of procedure, whether by rules of court or direct enactments."[1] In England between 1875 and 1890 the English courts handed down four thousand decisions on the judicature rules and the principles intended to be worked out by them.[2] The safer principle that alterations in the law should be made only when shown to be necessary seems to be the guiding principle of the New Jersey judges in the exercise of the power vested in them. This is shown by the fact that of the 180 supreme court rules now in force, 83 were annexed to the Practice Act at the time of its adoption and all but 13 of the additional 97 were in force before the act went into effect.

The old rules adopted under the new act treat for the most part of matters not within the main purpose of the act, such as

[1] Hepburn's *Historical Development of Code Pleading in America and England, Select Essays in Anglo-American Legal History*, Vol. II, p. 682.

[2] *34 Solic. Journ. and Rep.* 244 (1890).

admission and disbarment of attorneys, calendar practice, certiorari, dower, ejectment and costs. Incidental to the mention of certiorari, there is as yet considerable doubt as to whether the act applies to prerogative writs. Of the 13 new rules only 5 treat of the main subject of the act, and these, with a possible exception hereafter noted, carry out and extend the reforms therein inaugurated.

So far as the changes in the rules indicate, therefore, the present system has given satisfaction to the judges as well as to the practitioners.

There is one other observation that should be made *in limine*. It seems logical that the courts should be permitted to build the machinery which they must operate and to make such changes therein as experience suggests. This work is more properly entrusted to the judiciary than to the legislature. Even in code states rules of court are made by the judges, and under authority that runs back to the Act of 1792 the Supreme Court of the United States has made the rules under which the equity and admiralty jurisdiction of the federal courts is administered. The idea, therefore, of judge-made rules is neither unnatural nor unusual. Historically the entire field of practice was originally the work of judges. Of course, the success of such a system rests immediately upon the personnel of the bench, but it must rest either there or upon the personnel of the legislature. Undoubtedly the high quality of the New Jersey judiciary and also the distinction in qualification arising from the division that is still maintained in that state between law and equity have made easy the operation of the act we are considering. One circumstance in particular is to be emphasized. The attitude of the bench toward the reform has been generally sympathetic and in some instances enthusiastic. This is important. It was in a large degree the lack of sympathy for the Field code that led to its technical interpretation and the failure of its immediate object—the simplification of procedure.

The New Jersey Practice Act has gone further than permitting the judges to make rules. It provides that the rules may be relaxed or dispensed with by the court in any case where it shall be manifest that strict adherence to them will work surprise or injustice. This power is no less important than the power to make rules. It creates a condition of flexibility which permits the courts to remove the reproach against the administration of justice that has continued

to this day, *viz.*, that too great a price is paid for technicalities. It is probably not too great a generalization to say that most of the difficulties encountered in the administration of justice in courts of law, that is, in the administration of the procedure of such courts, result from the necessity on the one hand of preventing, through the allowance of liberal amendments, a failure of justice by reason of technical errors, and on the other hand, of penalizing litigants for mistakes, the correction of which would delay and, therefore, deny prompt justice to the meritorious suitor.

An example of the way in which a balance is being struck in New Jersey, as well as the flexibility gained by a liberal discretion in the judges, is suggested by the following observation in *Titus* v. *Penna. R. R. Co.*, 87 N. J. L., 157:

> It may well be observed in this connection that by rule 5 annexed to the Practice Act, now rule 218 of the Supreme Court, it is provided that the rules may be relaxed or dispensed with by the court in any case where it shall be manifest that strict adherence to them will work surprise or injustice; and the query naturally arises whether, where contributory negligence appears from the plaintiff's case upon the trial, being theretofore unknown to the defendant, the rule of pleading ought not to be relaxed, so that the defendant may have the advantage of that defence without having put it in issue, as that was impossible. This question however, is not pressing for solution, because the facts constituting contributory negligence, if there were such negligence in this case, were known to the defendant before the trial.

A further insistence on the flexibility of the act is found in *Kelly* v. *Faitoute Iron & Steel Co.*, 87 N. J. L. 567, in which the striking out of a counterclaim was upheld because it could not conveniently be tried with the principal action. In *Murphy* v. *Patton*, 85 Atl. 56, the act received the longest discussion found in any case, but it is noticeable that none of the discussion arises from any obscurity in the act. In the former of these two cases the question of counterclaiming for tort in actions of contract and in the latter that of the joinder of actions in tort and contract were touched upon. The latter practice was stated as permissible under the clear words of the act and the former, it was intimated, would also be allowed. In both cases the emphasis is put in a most refreshing manner upon the convenience of trial rather than upon technical distinctions. When we consider the volume of solemn nonsense that has been expended on similar subjects under the New York Code such an attitude may well cause satisfaction.

Next to the wide discretion reposed in the judiciary, one of the most prominent features of the Practice Act is the provisions relative to appeals. The striking difference between the practice thereunder and that under the New York Code is the prohibition of appeals from interlocutory orders. No more effective instrument of delay could be invented than the New York practice of carrying overruled demurrers and every disagreement as to an examination before trial or a bill of particulars to the Appellate Division. This evil, to be sure, is the creature of the Code System. Writs of error were never allowed at common law nor under the former practice in New Jersey until after final judgment, it being observed by Chief Justice Beasley that a contrary practice would lead to "the most serious vexation and delay."[3] The present act allows appeals only where writs of error were formerly allowed.

Another and more novel feature of the new practice is the limitation of new trials to the "question or questions with respect to which the verdict or decision is found to be wrong if separable." This rule has been beneficially applied in at least three cases appearing in the official reports. The accompanying rule that "when a new trial is ordered because the damages are excessive or inadequate and for no other reason, the verdict shall be set aside only in respect of damages and shall stand good in all other respects" has, however, been criticized by a writer in the New Jersey *Law Journal*.[4] Such a new trial, in the case of a compromise verdict by the jury, may result in practical injustice.

In an interview, which has proved illuminating upon the whole subject of this paper, Justice Swayze of the New Jersey Supreme Court drew attention to probably the only question under the Practice Act which has given rise to a considerable difference of opinion. In *Kargman* v. *Carlo*, 85 N. J. L., 632, and in *Miller* v. *Del. Riv. Trans. Co.*, 85 N. J. L., 700, the Court of Errors and Appeals has held that objections must still be taken to the rulings of the trial judge in order to lay the basis of an appeal. It is a question whether this was the intention of the framers of the act and whether the holding does not constitute a retrogression toward technicality. This decision was later embodied in a rule of court but an amend-

[3] *Cooper* v. *Vandeveer*, 47 N. J. L. 178.
[4] 38 N. J. L. J. 98 (1915).

ment by the legislature[5] reversed it in regard to causes submitted to the court to be heard without a jury under which circumstances "any error made by the court in giving final judgment in the cause shall be subject to change, modification or reversal without the grounds of objection having been specifically submitted to the court."

Another innovation brought about by the act under consideration is that of suing defendants in the alternative. A question has been raised[6] as to whether a defendant could be sued alternatively as an individual or as an executor. But in another case[7] the practice seems to have worked well. In the latter case a carpenter having done certain work in the interior of a building sued both the company that rented and occupied the building and the manager of the company who also held an option for the purchase of the building. It was this manager who had hired the carpenter and the capacity in which he had acted was in dispute. The jury held the company and released the manager which verdict was upheld on appeal. The court's observations on the question of appeal in such a case illustrate the working of the practice.

> There is another reason, founded on the bringing of the suit in the alternative, that should lead to a discharge of the present rule. On any reasonable theory of the case, a verdict against one defendant required a discharge of the other, and so the jury found. Now, if that verdict is brought in question, the other defendant should be heard as well as the plaintiff; for the natural inference in a case of this kind is that if the verdict against one defendant is wrong, the other defendant should have been held; and this the other defendant must be heard to controvert. Again, if the verdict be set aside as to the company, there ought to be a new trial as to both defendants, for if Steuerwald's verdict stands, peradventure a second jury will find the company not liable, and the plaintiff, though plainly entitled to be paid by one or the other, gets nothing from either. In such a case the rule should require both the plaintiff and the alternative defendant to show cause, and include both verdicts.

Difficulties of the kind that give rise to alternative pleading may sometimes be met, in jurisdictions where such pleading is not allowed, by alleging that the defendants are jointly liable and subsequently amending when the facts are discovered. The evils of such methods are obvious. Moreover where two suits are neces-

[5] L. 1916, p. 109.

[6] *Pfeiffer* v. *Badenhop*, 86 N. J. L., 492.

[7] *Crouse* v. *Perth Amboy Publishing Co.*, 85 N. J. L., 476.

sary there is always the danger of losing both although the liability of one of the two defendants is certain. The New Jersey procedure is perhaps liable to abuse but such has not come to the knowledge of the writer, who believes that provision to be beneficial.

Much of the simplification introduced by the act is a simplification of nomenclature rather than of procedure. The substitution of motions for demurrers and pleas, and of appeals for writs of error is of this character. The preliminary reference or "omnibus motion" introduced by the rules does not seem to have been frequently used by the bar and little, therefore, can be said of its practical usefulness.

A simple and expeditious method of examining adverse parties before trial before a commissioner without first securing an order for the purpose has been added by the legislature.[8]

The liberal rules as to joinder of parties plaintiff form a valuable part of the new system. As an example, a case in the litigation of which the writer is now engaged, was brought in which father and son were both joined as plaintiffs in a complaint for personal injuries to the boy. The difference between this single suit and two separate suits may not be in itself very considerable, but each instance of the kind constitutes a saving in efficiency which in the aggregate may be quite appreciable. Much more striking instances of this advantage may undoubtedly be found such as might occur in case of a railroad collision injuring many people.

In the domain of pleading the advance toward simplicity attained under the Practice Act has been noticeable. It is here that as an improvement of the practice of the state the reform has been most successful. At first there was a widespread impression among the bar that a complaint henceforward was to consist of a kind of newspaper report of the occurrences including all the circumstances and evidence. This false impression corrected, everything has worked well. Lawyers have had the benefit of the precedents of the English practice, and judges have repeatedly recommended a study of the forms of Bullen and Leake. The result has been a clear, simple method of pleading which must in every way have fulfilled the hopes of the reformers.

It may be too much to claim for the act that it solves the problem of procedure in courts of law, a problem that has engaged the

[8] L. 1914, p. 151.

attention of the best legal minds for centuries. Whether the brevity and simplicity of the system which constitute its great merit will prove permanently successful cannot be determined until after a considerable period of years, during which the system has manifested its ability to meet new demands and new conditions as they arise, but certainly thus far the results amply justify the expectations of its framers that the simplification of procedure by a concise and flexible body of rules formulated and applied by an able judiciary will be a great aid to the proper administration of justice.